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In the Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 569 and 570

JOHN R. EARLEY, ET AL., APPELLANTS

v.

JOAN DICENSO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the district court (App. 28–30) are reported at 316 F. Supp. 112.

JURISDICTION

The judgment of the district court was entered on June 17, 1970 (App. 50–51). The notices of appeal were filed on June 26, 1970 in No. 569 and on June 25, 1970 in No. 570 (App. 52–54). Probable jurisdiction was noted on November 9, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *.

The Rhode Island Salary Supplement Act, R.I. Gen. Laws, chap. 16–51, is reproduced in full at App. 182–186.

QUESTION PRESENTED

Whether the Rhode Island Salary Supplement Act, which provides supplements of fifteen percent of the annual salary of teachers of secular subjects in non-public schools, violates the Establishment Clause of the First Amendment, which applies to the States through the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The United States has filed a brief *amicus curiae* in *Lemon* v. *Kurtzman,* No. 89, this Term, involving the closely-related question of the validity under the Establishment Clause of the First Amendment of a Pennsylvania statute under which the State reimburses religiously-affiliated private schools for teachers' salaries incurred and textbooks and instructional materials used in teaching secular subjects. We set out at pages 2 to 4 of that brief the interest of the United States in that case. That discussion applies equally to the present case, where the government has the same interest.[1]

[1] In footnote 1 on page 4 of the *Lemon* brief, we noted that the constitutionality of Title II of the Elementary and Second-

STATEMENT

This is a suit to declare the Rhode Island Salary Supplement Act, R.I. Gen. Laws, chap. 16–51, unconstitutional and to enjoin its enforcement on the ground that the Act violates the Establishment and Free Exercise Clauses of the First Amendment (App. 4, 8). The plaintiffs are individual citizens and taxpayers of Rhode Island (App. 4). The defendants are the State Commissioner of Education, Treasurer, and Controller (App. 5), all of whom have official responsibilities under the Act. The intervenor-defendants are teachers eligible for salary supplements under the Act and parents of children in church-related schools (App. 28).

1. THE STATUTE

The Salary Supplement Act is based on legislative findings that about twenty-five percent of all elementary school pupils in Rhode Island attend nonpublic schools, that the quality of education in nonpublic schools has been placed in jeopardy by rising costs, and that the continued ability of nonpublic schools to pay salaries adequate to attract competent, dedicated teachers is a particularly serious problem. R.I. Gen. Laws § 16–51–1, App. 183. The stated purpose of the statute is to insure the maintenance of "a quality education for all Rhode Island youth," by "assist[ing]

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ary Education Act was then pending before the United States Court of Appeals for the Sixth Circuit in *Protestants and Other Americans United for the Separation of Church and State* v. *United States* (No. 20,270). On December 16, 1970, that court remanded the case to a three-judge district court for determination.

nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." *Ibid.*

The Act provides that the State will supplement the salaries of teachers of secular subjects in nonpublic elementary schools by not more than fifteen percent of an eligible teacher's current salary; as supplemented, the salary cannot exceed the maximum salary paid to teachers in Rhode Island public schools. § 16–51–4. For teachers to be eligible to receive the supplement, the school must not be operated for profit and must meet the educational standards prescribed in the State's compulsory school-attendance law (§ 16–51–2(1)); the annual per student expenditure for secular education must not equal or exceed "the average annual per student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year for school operations as determined by the commissioner of education." § 16–51–2(1).

A teacher receiving a supplement may teach only those subjects that are offered in public schools in the State. § 16–51–3(1). He must be certified by the state board of education "in substantially the same manner that such certificates are issued to teachers in public schools." § 16–51–3(3). He may use "only teaching materials which are used in the public schools of the state." § 16–51–3(4). Finally, any teacher applying for salary supplement must agree in writing "not to teach a course in religion for so long as or during

such time as he or she receives any salary supplements provided for under the provisions of this chapter." § 16–51–3(5).

2. THE EVIDENCE

At a hearing before a three-judge district court, extensive evidence was introduced concerning the nature of secular instruction in Roman Catholic elementary schools in Rhode Island and the impact of the challenged statute on that instruction. The appellees endeavored to show, in their words, that "religion is so integral and so substantial a part of the life and meaning and purpose of parochial schools that it is impossible in the statute which grants public funds to support one element to say that the effect of that statute is not to advance religion" (Tr. 16). By contrast, the burden of the appellants' case was that teachers who receive a salary supplement "teach subjects in a secular way with secular books and no different than they would in a public school" (Tr. 20).

The evidence showed that the environment of the Rhode Island Roman Catholic schools differs from that of the public schools in the following respects: The great majority of students are Roman Catholic (Tr. 78; App. 73). Crucifixes are located in most classrooms (Tr. 85, 150, 154; App. 77, 113, 114–115), and religious artifacts and paintings are present in many school buildings (Tr. 85–86, 134; App. 77, 104). But the "decor or decoration of the rooms is what you might say basically the same as you would expect to find in any modern elementary school" (Tr. 134; App. 104). The day is generally begun with a prayer, although there is no set rule on this, and the prayers are increasingly of the

spontaneous, student-composed variety (Tr. 86, 90–91, 102, 135–136; App. 77, 80, 87, 105). There are separate classes for religious instruction (Tr. 87, 133; App. 78, 104). School assembly programs cover a wide range of civic and religious matters (Tr. 95–96, 97, 99; App. 83–84, 85), although assemblies are held relatively infrequently, perhaps three or four times a year (Tr. 133–134; App. 104).

There was also uncontradicted evidence from several witnesses, including the superintendent of the Providence Roman Catholic school system and teachers in that system, that religious and secular instruction are completely and strictly separated. The superintendent stated unequivocally that he did not expect teachers to inject any religious content into secular courses (Tr. 103; App. 87), and the teachers who testified were unanimous in confirming that there was no religious element in any of the secular courses they taught, which included mathematics, science, reading, English and social studies (Tr. 131, 141, 147; see also Tr. 156–157; App. 103, 108, 111; see also App. 116). There was uncontradicted testimony that a teacher of a secular subject might discuss freely any matter that arose in his classroom, even if it had religious overtones, as he saw fit (Tr. 99, 101; App. 85, 86).

All but three or four of the 98 elementary schools in the Providence Diocese are staffed by both lay and clerical teachers (Tr. 76; App. 73).[2] Approxi-

[2] One of the three or four exceptions is composed entirely of lay teachers, and two or three entirely of clerical teachers (Tr. 76; App. 73).

mately one-third of all the teachers in the system are lay (Tr. 77; App. 73), and of these some ten to fifteen percent are non-Catholics (Tr. 81–82; App. 75–76). Two of the teachers who testified were not Catholics (Tr. 141, 151; App. 108, 113). One of them stated that when he was interviewed for the position, he was not asked his religious affiliation, but had volunteered it and had been told that it was irrelevant (Tr. 141–142; App. 108). None of the teachers who testified teaches a course in religion, and teachers who do teach such courses do not apply for a salary supplement (Tr. 88, 131, 141, 147, 152; see also Tr. 156–157; App. 79, 103, 108, 111, 114; see also App. 116).

On the basis of this evidence, the district court found that the "concern for religious values does not necessarily affect the content of secular subjects in diocesan schools" (App. 35).

The district court also received considerable evidence concerning the effect of the Salary Supplement Act on the quality of secular education in the Catholic schools. In 1970, about 29,340 pupils attended the 98 elementary schools of the Providence Diocese (Tr. 77; App. 73). The parents of these children pay tuition, which covers perhaps 40 percent of the total cost of operating the schools; whatever difference remains is generally provided by the individual parishes to which the schools are attached (Tr. 83; App. 76).

Whereas a decade ago all but about eight percent of the teachers in the system were clerics (principally nuns), the percentage of lay teachers has been rising steadily, apparently because of the limited number of

nuns available (Tr. 113–114; App. 92–93); as previously noted (*supra*, p. 7), today one-third of the teachers are lay. Because of higher salaries in the public schools, however, the parochial school system has found it increasingly difficult to recruit qualified lay teachers. Whereas a nun receives $1,800–1,900 per annum, the Providence public schools pay teachers between $7,000 to $11,000 (Tr. 106, 108; App. 89, 90).

Because the revenues available to the parochial system will permit only a salary for a lay teacher in the $5,000 range, the ability of schools to compete for able lay teachers has been severely impaired (Tr. 105–109; App. 88–91). In 1968–1969, the system offered $5,000 per year, but was unable to recruit sufficient teachers with suitable educational backgrounds (Tr. 105; App. 88). If, however, the parochial schools were able to offer salaries within $500 of the rate offered by the public scools—which they believe they can do with the salary supplement and additional contributions from the parishes (App. 92)—it was anticipated that they would be able to obtain competent teachers (Tr. 109; App. 90).

The Salary Supplement Act increased the ability of the parochial system to pay competitive salaries, and after the Act was passed the system offered $6,000 per annum (Tr. 105–112; App. 88–92). The result was "a considerable increase in the quality of the teachers that applied this past year" (Tr. 104; App. 88), as measured by their educational background and teaching experience (*ibid.*).

3. THE DISTRICT COURT DECISION

The district court acknowledged that the Salary Supplement Act "was not intended to advance or interfere with religion" (App. 39), and recognized that its effect was to advance the quality of secular education in Rhode Island's Catholic elementary schools (App. 37). As noted previously, it also found that religious doctrine does not necessarily intrude into classroom instruction in secular subjects (App. 35). The court held, however, that the Act contravened the Establishment Clause, because it "results in excessive government entanglement with religion" (App. 45).[3]

The court held (App. 37) that the statute has the dual effects of (1) "aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools" and (2) "giv[ing] significant aid to a religious enterprise." Expressing concern that "sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities" (App. 41), the court declined "to focus solely on the [secular] activity subsidized [by the State] in judging effect" (App. 40). It ruled that under *Walz* v. *Tax Commission,* 397 U.S. 664, the question is "whether the statute furthers 'excessive entanglement' between government and religious institutions," and that "the test of a statute's effect is

[3] The court rejected appellees' claims that the Act impedes the free exercise of their religion, because the appellees demonstrated no coercive effect of the Act on their beliefs or practices (App. 37–38).

not whether the * * * activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards" (App. 41–42).

The court concluded that under this test the Act involves two impermissible elements of government involvement in religion. *First*, it concluded that the annual renewal of the subsidy "will inevitably excite bitter controversy"—a prospect the more likely, the court believed, because of "the continuing financial crisis" of the parochial schools (App. 43). *Second*, the court reasoned that the Act might interfere with the religious freedom of the parochial schools themselves. The court noted that some teachers had stopped teaching courses in religion in order to be eligible for salary supplements, and referred to the possibility that for some purposes the parochial schools might become instrumentalities of the state and hence no longer entitled to discriminate in hiring or admissions (App. 44-45).[4] The court concluded that the "necessary effects of the kind of legislation involved here" was "not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid" (App. 45).

[4] The court rejected the claims of parents that their right to free exercise would be infringed if the quality of secular education available in parochial schools were to decline significantly, and the claim of parochial schoolteachers that State aid to private secular schools alone would deny them the equal protection of the laws (App. 46–47).

Judge Pettine, concurring in the result, agreed that the Act "involves * * * 'reciprocal embroilments of government and religion * * *,'" but disagreed with the court's alternative ground that the Act's effect "is substantially to support a religious enterprise" (App. 48). He stated that there was no evidence of state support for anything but the secular aspects of parochial school education, agreed that *Allen* recognized that the secular and religious functions of those schools could be distinguished, and concluded that the general "mission" or "atmosphere" of the parochial schools is irrelevant (App. 48–50).

ARGUMENT

THE PURPOSES AND EFFECT OF THE SALARY SUPPLEMENT ACT ARE PRIMARILY SECULAR, AND THE ACT DOES NOT INVOLVE EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

INTRODUCTION AND SUMMARY

In our brief, *amicus curiae,* in *Lemon* v. *Kurtzman,* No. 89, this Term, and in our brief in *Tilton* v. *Richardson,* No. 153, this Term, we have discussed at some length the principles and authorities that determine the validity of government aid to church-affiliated schools. We there showed that this Court has recognized three basic principles that control this case.

First, in order to achieve purposes that are essentially secular, the State may take action that involves contact with religious institutions. To distinguish "between forbidden involvements of the State with reli-

gion and those contracts which the Establishment Clause permits," the central question is:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. * * *

Board of Education v. *Allen*, 392 U.S. 236, 243. See also *Abington School Dist.* v. *Schempp*, 374 U.S. 203; *Everson* v. *Board of Education*, 330 U.S. 1. *Allen* makes it clear that secular instruction can be distinguished from the propagation of religion in church-related schools, and that financial aid for secular instruction is permissible, as long as it is granted under adequate safeguards to insure that a secular effect is achieved.

Second, State action relating to religion is not invalid merely because its effect may be to further the free exercise of religion, provided that such action does not discriminate in favor of particular religions or in favor of religion generally as against non-religion. Thus, while a State is not required to pay the bus fares of all school children, it may do so without regard to whether they attend a denominational school; payment of bus fares for children in religiously-affiliated schools furthers the free exercise of religion and avoids a distasteful, if not a prohibited, discrimination. *Everson* v. *Board of Education*,

330 U.S. 1, 16. See Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 139 (1965). For similar reasons, while the Constitution does not require exemptions for Sabbatarians in those states that have Sunday closing laws, it does not prohibit granting such exemptions. *Braunfeld* v. *Brown,* 366 U.S. 599, 608 (opinion of Chief Justice Warren). See also *Zorach* v. *Clauson,* 343 U.S. 306, 314; cf. *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 306 (concurring opinion of Mr. Justice Goldberg).

This Court recently said: "The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Commission,* 397 U.S. 664, 673. On this basis, the Court in *Walz* construed New York's exemption of churches from taxation as a valid attempt to "spar[e] the exercise of religion from the burden of property taxation levied on private profit institutions," rather than an attempt to establish religion. *Ibid.*[5]

Third, although *Allen* recognizes the need for safeguards to insure that a secular goal does not in practice actually foster or impede religion, *Walz* indicates that excessive governmental involvement may invalidate a government plan of assistance to religious en-

[5] The conclusion in *Walz* that government may accommodate religion more permissively than it may interfere with its exercise finds substantial support in the history of the religion clauses of the First Amendment. See generally Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (1965).

tities. "[T]he questions are whether the involvement is excessive, and whether it is a continuing surveillance leading to an impermissible degree of entanglement." 397 U.S. at 675.

The district court concluded, however, that rather than merely adding the qualification stated in the preceding paragraph, *Walz* made a "significant refinement" in the "purpose and effect" test this Court had applied in previous decisions. *Walz,* according to the district court, "makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards" (App. 42). "Judged by this standard" (*ibid.*), the court concluded, the Salary Supplement Act involved a forbidden degree of government entanglement.

We show in Point B, below, that the Act does not violate that precept. But the district court also erred in its interpretation of *Walz.* For in *Walz* the Court cited *Allen,* with apparent approval, for the statement that supplying "costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment" (397 U.S. at 672). The Court also stated (p. 669): "Each value judgment under the Religious Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have

the effect of doing so"—a formulation that embodies the purpose and effect test. *Walz* thus adds to the purpose and effect test the additional test of excessive involvement—but does not replace or modify the former standard.

On both standards, we submit that the Rhode Island statute is consistent with the Establishment Clause. As we show below, (1) the statutory purpose was to meet the serious educational problem of maintaining the quality of secular education in religiously-affiliated schools. The competence of teachers of secular subjects and the quality of instruction in those subjects are of legitimate legislative concern. The effect of the statute, as the district court recognized, also is secular; religion does not intrude into secular instruction in the Rhode Island parochial schools, and the statute has improved the quality of that instruction. (2) The Rhode Island statute contains adequate safeguards to insure that it does not entangle the State excessively in religion.

A. THE ACT HAS THE SECULAR PURPOSE AND EFFECT OF MAINTAINING THE QUALITY OF SECULAR INSTRUCTION PROVIDED TO ELEMENTARY SCHOOL STUDENTS ATTENDING CHURCH-RELATED SCHOOLS

1. The district court found that the Salary Supplement Act "was not intended to advance or interfere with religion" (App. 39). The court accepted the legislative declaration that its purpose was "to provide a quality education for all Rhode Island youth, those in public and nonpublic schools alike," § 16–51–1, and declined to "divine the 'true intent' of the legislature by inspecting the activities of lobbyists" (App. 39).

So viewed, the court had "little difficulty" in finding that the legislature's "concern for the quality of education afforded to Rhode Island youth" was "legitimate" (App. 39–40).

This conclusion was correct. In *Allen*, this Court, sustaining a New York statute providing for the loan of textbooks to pupils in church-related schools, held the "furtherance of the educational opportunities available to the young" to be a proper, secular legislative purpose. 392 U.S. at 243. *Allen* indicated that the "stated purpose" of the legislature is determinative of its intention. *Ibid.* This holding is consistent with the long-standing prohibition on judicial scrutiny of the motives of legislators or the underlying compromises and accommodations that shape the contours of particular statutes. *United States* v. *O'Brien*, 391 U.S. 367, 383; *McGowan* v. *Maryland*, 366 U.S. 420, 496 (opinion of Mr. Justice Frankfurter); *Barenblatt* v. *United States*, 360 U.S. 109, 132–133; *McCray* v. *United States*, 195 U.S. 27, 56.

The secular purpose of the Rhode Island Act is also reflected in the legislative concern over the quality of the education of those children whose parents choose to enroll them in a church-related school. As we have shown in our briefs in *Tilton* v. *Richardson*, No. 153, this Term (pp. 26–28), and *Lemon* v. *Kurtzman*, No. 89, this Term (pp. 18–19), this is a proper subject of legislative concern.

As the legislative findings state, nonpublic schools were experiencing great difficulty in paying the salaries required to attract teachers of professional background comparable to those employed in the public

schools. See § 16–51–1. The record in this case confirms the seriousness of the problem (see the Statement, *supra,* pp. 7–8). Rather than force religiously-inclined parents and pupils to a reluctant choice between their religious beliefs and their secular education, Rhode Island chose to aid the latter without touching the former.

Like the Pennsylvania Act challenged in *Lemon,* therefore, the Rhode Island Act rests on two related secular bases. First, since the State cannot compel attendance at public schools, *Pierce* v. *Society of Sisters,* 268 U.S. 510, it may undertake to support the quality of secular education offered in nonpublic schools. See *Allen, supra,* 392 U.S. at 247. Second, it may especially do so where its action obviates the need for parents who wish a religious education for their children to sacrifice the quality of the instruction they receive in those schools.

2. Given the validity of these purposes, the only question is whether there is anything "about the necessary effects of the statute that is contrary to its stated purpose." *Allen, supra,* 392 U.S. at 243. The court below found that the statute had two significant effects. On the one hand, it acknowledged that the Act would assist in maintaining secular educational standards in Catholic schools. On the other, it saw the Act as aid "to a religious *enterprise*" (App. 37; emphasis supplied), and on that ground held the Act invalid.

Allen makes it clear, however, that the focus of the inquiry is not on the entire "religious enterprise." If it were, then all aid would be impermissible, since it

necessarily has the effect of assisting that total enterprise. Instead, *Allen* recognized that church-related schools "are performing, in addition to their sectarian function, the task of secular education," 392 U.S. at 248, and the question is whether State assistance to the "secular education" "task" constitutes "unconstitutional involvement of the State with religious instruction" (*ibid.*).

The district court stressed the benefits that inure to the parochial schools from having their religious and secular aspects in close spatial and temporal proximity to each other. Stating that "the Church gains special advantage from a curriculum which contains both religious and secular subjects," the court noted the religious benefits that flow from the existence of high standards in secular education (App. 36–37). From this it concluded that although religious doctrine does not permeate secular instruction in Rhode Island,

> the combined conveniences of ready access to church and pastor, homogeneous student body, and ability to schedule throughout the day a blend of secular and religious activities makes the parochial school a powerful vehicle for transmitting the Catholic faith to the next generation. It also seems clear to us that this essentially religious enterprise cannot succeed without good teaching in secular subjects. If the quality of teaching falls too low, then not only will Catholic parents be reluctant to enroll their children, but the parochial schools could also run afoul of Rhode Island's education laws. * * * [App. 36–37.]

This reasoning is inconsistent with the ruling in *Allen* that, merely because State assistance may make church-related schools more attractive and in that way further their religious mission, the aid is not for that reason impermissible.

The district court here stated that by equalizing standards of secular instruction, the Rhode Island Act probably would diminish the reluctance of parents to send their children to such schools. But in *Allen* this Court said: "Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." 392 U.S. at 244. Thus, State assistance stemming from a valid secular purpose is not unconstitutional merely because it may constitute an incidental aid to the recruitment or retention of students in religiously-affiliated schools. All such aid is likely to have that effect, and under the district court's analysis all State aid, no matter how secular its purpose, would be invalid because of its collateral effect of making the church-affiliated school a better and more attractive educational institution. It was for that reason, we believe, that *Schempp* and *Allen* properly emphasized the primary effect of the aid.

Allen indicates that a major concern of the Court was the possibility that in some parochial school systems the religious and secular instruction might be so intertwined that State assistance to the secular component necessarily would constitute forbidden govern-

ment support of religion. For in upholding the New York textbook law, *Allen* relied to a large extent on the absence of any evidence of intermingled or inseverable functions. "Nothing in this record," said the Court, "supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books." 392 U.S. at 248. The Court in *Allen* declined to hold as a matter of law that the sacred and the secular were necessarily intertwined in church-related schools:

> Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. * * * [Ibid.]

In the present case appellees undertook to prove that a separation of secular and religious instruction was impossible in the Rhode Island Roman Catholic schools. They failed to do so. As the court below recognized at several points (App. 35–36), the evidence was to the contrary. Although, as stated above (*supra*, pp. 5–6), the Providence diocesan schools share many elements of daily routine, decor, curriculum and instruction with public elementary schools, they also have aspects, such as sacred symbols, homeroom pray-

ers, and periods of religious instruction, which are peculiar to church-affiliated schools.

But there was no evidence that secular instruction in those schools is permeated with religious dogma or even sectarian points of view. Quite the contrary: the uncontradicted testimony was that secular teachers are not expected to impart religion in secular subjects, do not do so in practice, and are completely free to teach their subjects in their own way. The court below accepted this testimony, which it said "gains added credibility from the fact that several of the teachers were non-Catholics" (App. 35). Thus, the record in the present case establishes that religion does not permeate secular teaching in the Rhode Island parochial schools. In *Allen*, the Court would not presume that the statute "results in unconstitutional involvement of the State with religious instruction * * *" 392 U.S. at 248. Here the appellees could not demonstrate that it does.

Nevertheless, the district court found the "concern for religious values" (App. 35) exhibited by diocesan schools to be constitutionally significant, for it meant that among "the necessary effects of the kind of legislation involved here" is "substantial support for a religious enterprise" (App. 45). This determination, based solely upon the "atmosphere" of the school as a whole and not upon any evidence of the intrusion of religion into secular teaching, is inconsistent with *Allen* (App. 48–49). When this Court decided *Allen*, it obviously understood that church-related schools exist in part to perpetuate the faith and to foster thought and conduct in conformity with it. Clearly, it knew,

too, that church-related schools are sometimes located adjacent to churches, that religious symbols sometimes adorn their walls, and that they give courses in religion. Yet this Court declined to invalidate State assistance to secular instruction in church-related schools on those grounds.

3. In holding that the New York Textbook Act properly effectuated its secular purpose, *Allen* emphasized the structure of the statutory scheme. In our *Lemon* brief we pointed out that the Pennsylvania statute there involved was narrowly drawn to avoid the possibility that the State might in practice be subsidizing the teaching of religion and to insure that the Act's secular objectives are being fulfilled. We stressed the statutory prohibition on the teaching of religion, the limitation of the reimbursment provisions to four subjects far removed from religious controversy, the requirements that teachers seeking reimbursement be certified by public authorities and that pupils be subjected to standardized examinations. See our *Lemon* brief, pp. 20–21.

The Rhode Island statute challenged here contains many of the same safeguards and others as well. A teacher who receives a salary supplement must agree in writing not to teach a course in religion for the duration of his supplement. § 16–51–3(5). He must be certified by the State education authorities in the same manner as public school teachers, § 16–51–3(2), thus assuring that his professional qualifications equal those of his colleagues in the public schools. The subjects taught may be only those taught in public schools, and they must be taught "only [with] teaching materials used in the public schools of the state."

§§ 16–51–3(1), 16–51–3(4). Thus, while the permissible subjects a teacher receiving aid may teach are somewhat broader in Rhode Island than in Pennsylvania, he may use only those non-religious materials that are permitted in the Rhode Island public schools—a substantial guarantee of secularity.

Finally, whereas Pennsylvania's statute permits salary reimbursement in full, Rhode Island's provides only a 15 percent salary supplement. § 16–51–4. The evidence in the record shows that this amount would barely suffice to enable the parochial schools to compete for able teachers but would not allow displacement and reallocation to religious purposes of funds that would otherwise be spent for the salaries of teachers of secular subjects (Tr. 112; App. 92).[6] Like the statute sustained in *Allen* and the one challenged in *Lemon*, the Salary Supplement Act contains adequate provisions designed to limit the aid to the purely secular instruction in the quality of which the State has a compelling interest.

B. THE ACT DOES NOT CREATE EXCESSIVE GOVERNMENT ENTANGLEMENT IN RELIGION

This Court in *Walz* indicated that the Establishment Clause forbids "excessive government entangle-

[6] It is clear, moreover, from *Walz* that financial benefit to religious institutions is not the touchstone of constitutionality. *Walz* pointed out that in *Allen* "making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment" [397 U.S. 664, 671–672].

ment with religion." 397 U.S. at 674. It further recognized that the question of entanglement "is inescapably one of degree," a matter of determining "whether the involvement is excessive * * *." *Id.* at 674, 675. The safeguards required by *Allen* must be balanced against the entanglement proscribed by *Walz*.

If Rhode Island permitted the serious financial situation of church-related schools to worsen, the result might have been a deterioration of the quality of secular instruction that would have led some parents to transfer children to the public schools despite their religious convictions. Indeed, at some point the State education authorities might have to investigate the secular education offered at church-related schools to determine whether they should continue to be certified as meeting minimum standards. On the other hand, the State's program of assistance for secular instruction necessarily involves some government involvement; as *Allen* indicates, there must be safeguards to prevent misdirection of funds to religious uses. The issue is whether the involvement required by the particular Rhode Island safeguards is "excessive."

The court below ruled that it is. It concluded that the annual renewal of salary supplements is likely to engender religious strife, and it foresaw that the Act would cause "significant state limitations on the freedom of denominational schools" (App. 43).

1. We have discussed the divisiveness argument in our *Lemon* brief (pp. 22–24). There we pointed out that the argument is conjectural and underestimates the traditional and continuing role of religious groups

in the political process and the ability of that process to accommodate the religious demands within the confines of the established doctrine that assistance is permissible only for secular functions. There is no reason why salaries for secular instruction are more likely to prompt widespread religious bitterness than, for example, the longstanding disputes over birth control, temperance, divorce or abortion, all of which have involved the interaction of religion with politics.

2. The district court held that the Salary Supplement Act interferes unduly with the internal affairs of religious bodies in three respects.

a. The court was concerned that the State "must monitor parochial school expenditures and in close cases determine which spending is 'religious' and which is 'secular' " (App. 43), because the Act excludes from its coverage those schools "whose annual per student expenditure for secular education equals or exceeds the average annual per student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year for school operations * * *." § 16–51–2(1). The court foresaw that the per student expenditure requirement might create disputes over what was secular and what religious, and might even "influence the allocation of church resources as the parishes tailor their spending to meet the Commission's criteria" (App. 44). While there may be borderline cases, the need to make the distinction does not invalidate the plan. Moreover, such a distinction has thus far been required at most only once: there has been only one school whose

teachers were denied salary supplements because its expenditures were too high (Tr. 125; App. 99–100). The parochial schools, which educate 95 percent of all children in nonpublic schools in Rhode Island (App. 32), appear uniformly to come within the expenditure limits.

b. The court suggested that the Act would restrict the role of teachers, for example, by inducing them to abandon teaching of religion to qualify for the subsidy (App. 44). But the statutory provision that teachers cannot teach religion in the school while they receive a supplement[7] is the same restriction under which teachers in public schools operate. It does not go beyond what is reasonably required to insure that the funds are used solely for secular purposes, as *Allen* requires.

c. Finally, the court suggested that State assistance might render parochial schools State agencies for Fourteenth Amendment purposes and restrict their ability to discriminate in selecting teachers and students on religious grounds (App. 44–45). But the Rhode Island parochial schools do not limit their teaching staffs to Catholics (see Tr. 141–142; App. 108): 10–15 percent of the teachers are non-Catholic (Tr. 81–82; App. 75–76). If religious criteria are used in the selection of teachers or students (and the record appears to be silent on the latter), the schools may contend that such discrimination is protected by the Free Exercise Clause. In any event, the choice whether to accept state funding in these circumstances

[7] The certification conditions imposed by the Act are reasonable and unrelated to religious freedom.

appropriately may be left to the institutions themselves; the problems that concerned the district court do not demonstrate an impermissible degree of government involvement in religion.

Indeed, several of the most important safeguards of the Act involve no significant government entanglement in religion at all. Thus, whether the subjects taught and the material used are the same as those in the state public schools, and whether the teachers are qualified to teach in the public schools, are matters capable of easy ascertainment by objective standards and involve no supervision or scrutiny of the classroom. The basic assurance that the instruction in religiously-affiliated schools for which Rhode Island provides salary supplements is both secular and of high quality does not involve significant government intrusions into the affairs of the diocese or the parish.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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* In lieu of the Solicitor General, who is disqualified for personal reasons.

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